82 - 2154

No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

MONTGOMERY MALL LIMITED PARTNERSHIP

Petitioner,

v.

GENERAL ELECTRIC CREDIT CORPORATION,

Respondent,

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

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June 30, 1983

QUESTION PRESENTED

Whether a bankruptcy court has jurisdiction and violated the 10-day notice provision of the rules of procedure by granting summary judgment for foreclosure of security agreements in respect to real and personal property of a debtor in a foreclosure suit removed from state court when the filing fee had not been paid, no adversary proceeding number assigned, no answer or trial date set, no summons issued, but a copy of a Motion seeking relief from the automatic stay and for summary judgment in a separate adversary proceeding in a Chapter 11 proceeding under The Bankruptcy Act was hand delivered to debtor's counsel minutes before the hearing?

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OPINIONS BELOW

The opinion of the Court of Appeals (A1) is reported at 704 F 2d 1173 (10th Cir. 1983). The judgment of the United States Bankruptcy Court for the District of New Mexico is not officially reported. (A2) The District Court affirmed the decision of the bankruptcy court.

JURISDICTION

The judgment of the Court of Appeals was entered on April 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1). The jurisdictions of the bankruptcy court and the district court were invoked under 28 U.S.C. § 1471 (c) and 1478.

STATUTES INVOLVED

The text of 28 U.S.C. § 1914 and 28 U.S.C., Federal Rule of Civil Procedure 56(a), (c) are set forth in the Appendix B1 and B2.

STATEMENT OF THE CASE

On June 16, 1980 General Electric Credit Corporation ("GECC") commenced a foreclosure action against Montgomery Mall Limited Partnership ("MMLP") in a New Mexico state court, for appointment of a receiver and foreclosure of its mortgages on the Montgomery Mall Shopping Center, the principal asset of MMLP, and to foreclose its security agreement with respect to rents and profits. MMLP filed an Answer on July 15, 1980, admitting the existence of the security agreements but denying that it was in default or that GECC was entitled to foreclose. A receiver was appointed in

the state court. GECC filed a Motion for Summary Judgment on August 19, 1980, which was set for hearing on September 8th. On September 4th MMLP sought protection under the Bankruptcy Act by filing a voluntary petition under Chapter 11 for reorganization in the United States Bankruptcy Court for the District of New Mexico.

On September 24, 1980, GECC filed a complaint to Modify Stay in the Bankruptcy Court along with a $60.00 filing fee, which was designated an adversary proceeding under Cause No. 80-0419J ("Case 1"). Dates for answer and trial were designated in a Summons, which was issued in said cause. On the same day, the Summons and Notice of Trial were hand delivered to MMLP's counsel of record, but a copy of the Summons and Complaint were not mailed to MMLP until September 30th. The Summons required answer on October 14, 1980 and set the matter for trial on October 23, 1980.

Also on September 24, 1980, GECC filed in the bankruptcy court an Application for Removal and Bond on Removal, solely bearing cause number 80-00938J. (Appendix A4) The bankruptcy court Clerk accepted and filed the removal petition ("Case No. 2") but assigned no adversary proceeding cause number, set no answer or trial dates issued no

sumonses. The Clerk even failed to collect the required filing fee therefore. Third, GECC on September 24th filed a Motion to Dismiss and Prohibit Debtor's Use of Cash Collateral in Case No. 2. No hearing date was ever filed for this Motion.

On October 1, 1980, local counsel for MMLP filed a Motion to Withdraw. The next day, October 2nd, GECC filed a Motion in Case No. 1 (80-0419J) seeking relief from the automatic stay, summary judgment and an order directing turnover of cash collateral. (Appendix A3) The motion was hand delivered to MMLP's counsel "on the way to the hearing" shortly before 9:30 a.m. on October 2nd. The hearing took place immediately, and the bankruptcy court overruled MMLP's objections to the short notice, even though the court was informed that although MMLP's principal officer had no knowledge of the October 2nd Motion, but had made prior plans to fly to Albuquerque to confer with MMLP's lawyer's and the receiver, Richard J. Leon, regarding MMLP's problems and the repair of the newly-discovered structural problems of the property, was then en route and expected to arrive at 2:00 p.m. that afternoon.

After testimony and argument, the bankruptcy court entered an Order and Judgment not merely lifting the stay and

ordering turnover of cash collateral, but also finding that GECC had a valid mortgage and security interest in an amount in excess of $8 million, plus interest and attorney's fees, and granting summary judgment therefore and ordering sale upon foreclosure thereof. (Appendix A2) The Order and Judgment was granted in Case No. 1 despite the fact that the foreclosure was in the separate removed action.

Pursuant to Rule 802 of Bankruptcy Procedure, MMLP on October 14th filed a Motion to Vacate the Judgment, which was set and heard on October 30, 1980. MMLP argued at the hearing that the October 2nd hearing was without notice or effective notice and that the October 2 and 30 hearings were not upon the removed action (Case No. 2), but upon the motion in Case No. 1 and it was error to entertain summary judgment. MMLP further argued that the burden of proof had changed and requested the court to vacate the summary judgment so that with respect to those issues the hearing would proceed de novo. However, the court refused to do so. Notwithstanding MMLP's objections, the bankruptcy court entered Findings of Fact, Conclusions of Law and Order on November 3, 1980, not merely denying MMLP's Motion to

Vacate upon findings of sufficiency of notice, but finding the foreclosure decree to have been granted upon the removed state action (Case No. 2), that MMLP had notice of the summary judgment proceeding and opportunity to controvert the affidavits of GECC.

The removal action is Cause No. 80-00938J (Case No. 2) and bears no adversary proceeding number. Nor was a filing fee ever received or paid in respect to the removal action. The judgments and order appealed herein all bear Adversary Proceeding No. 80-0419J. The Motion delivered at the October 2 hearing also bore Cause No. 80-0419J, as do the court proceedings on October 2 and 30. (See Appendix A) That Motion requested relief from the stay, for summary judgment and for an order seeking turnover of cash collateral; however the Complaint in Case No. 1 (Cause No. 80-0419J) sought no more than relief from the stay.

MMLP filed its Notice of Appeal to the United States District Court of New Mexico on November 12, 1980, which affirmed the order of the bankruptcy court, and MMLP appealed to the United States Court of Appeals for the Tenth Circuit.

The Tenth Circuit affirmed the decision, rejecting MMLP's jurisdictional argument on the basis that this Court ruled that the decision in Northern Pipeline Contruction Co. v. Marathon Pipe Line Co., _____ U.S. _____, 102 S. Ct. 2858 (1982) would be applied prospectively only. The Court of Appeals held that, regardless of the short notice, "MMLP should have been aware that GECC was likely to pursue summary judgment relief in bankruptcy court," because a motion for summary judgment had been filed in the state-court proceeding prior to removal and MMLP "should have prepared affidavits in opposition to GECC's state court motion ... which could have been used in opposition to GECC's bankruptcy court motion." The court, relying on 28 U.S.C § 1479 (c) and by analogy to 28 U.S.C § 1450, reasoned that because the state-court motion for summary judgment survived the filing of the bankruptcy petition, no notice that the motion would be heard had to be filed or given. The Court of Appeals also ruled that the grant of summary judgment on such short notice would not be disturbed unless MMLP had demonstrated prejudice at the hearing. The Tenth Circuit reasoned further that the defect in notice was cured when MMLP was ultimately given an opportunity to be heard via the hearing on MMLP's Motion to

Vacate held on October 30th. Finally, the Court of Appeals relied on Section 362 (f) of the Bankruptcy Act for the proposition that no notice whatsoever was required.

REASONS FOR GRANTING THE WRIT

1. The advent of removal of civil actions to the bankruptcy courts envisioned under the Bankruptcy Act requires that stricter procedures be utilized by the bankruptcy court to assure that precipitous decisions by the bankruptcy courts do not vitiate the protection of the Bankruptcy Act. MMLP voluntarily filed its petition in bankruptcy in order to obtain additional time in which to order its affairs. The previous general partner had withdrawn in the summer of 1980 and Montgomery Mall Associates, Inc., had recently become the substitute general partner in an effort to save the shopping center for the benefit of the limited partners. In June of 1980, severe weather had damaged the property. Design Professionals, Inc., professional engineers, were engaged to report on the damage; Howard S. Cottrell of that firm discovered the structural defects, on which GECC and the bankruptcy court justified emergency relief. The report was not received by the receiver until September 26, 1980. (See affidavit attached to Appendix A3) In response to the report,

the new general partner had already made plans to fly to Albuquerque to meet with the receiver and others in order to commence necessary repairs. However, the precipitous action of the bankruptcy court thwarted all efforts of MMLP to cure the structural problems, put its financial affairs in order, and even to reach the step of filing a plan of reorganization.

2. With the advent of removal to the bankruptcy court, it is imperative that separate adversary proceedings be handled in a manner that gives adequate notice to the debtor that the court will rule on important substantial matters. It is well established that no court has the power to grant summary judgment if not presented in that case. Face v. Bland, 369 U.S. 633, 670-71 (1962); S. S. Kresge Co. v. NLRB, 416 F. 2d 1225, 1234-35 (6th Cir. 1969). Under Federal Rule of Civil Procedure ("F.R.C.P.") 56 (c), summary judgment may only be rendered "if the pleadings ... on file ... show ... that the moving party is entitled to a judgment ...." There must be both allegation and proof. 49 C.J.S., Judgments § 222, at 408 (1963). The cause before the court was Adversary Proceeding No. 80-0419J, and the motions considered at the hearings were in that same Case No. 1. The complaint in the case merely

sought relief from the stay to pursue the foreclosure remedy elsewhere. A money judgment and order for foreclosure are not generally one in the same. Cf. In Re Brothers Coal Co., Inc., 3 C.B.C. 2d 31 (W.D. Va. 1980); Porter v. Alamocitos Land & Livestock Co., 256 P. 179 (N.M. 1923). While removal is a new procedure under the Bankruptcy Act, the rules clearly reveal that removed causes are to be treated adversary proceedings. Interim Suggested Rules of Bankruptcy Procedure 7001, 7004. No other procedure is applicable because under Title 11 of U. S. C., bankruptcy courts are not granted general legal and equitable jurisdictions. Rules 703 and 704 of Bankruptcy Procedure required that a trial date be set and a summons or notice issued and returned, and the court cannot waive such rules. U. S. v. Brandt, 8 F.R.D. 163 (D Mont. 1948). GECC could have consolidated or joined its complaint with its removal action prior to either the October 2nd or 30th hearings pursuant to Rule 718 of Bankruptcy Procedure. Until then each case should have been treated separately. In Re Mullins, 2 C.B.C.2d 748 (C.D. Cal. 1980); Mississippi v. Burgarner, 250 F. Supp. 597, 598-99 (N. D. Miss. 1965). Moreover, the removal was not even lawfully before the court, because the filing fee was never paid. In Re Mullins, supra; 28 U.S.C. § 1914.

That GECC moved the state court for summary judgment is not notice that summary judgment will be heard in Case No. 1. Besides, the rationale of the Tenth Circuit that affidavits "should have been prepared" is totally unrealistic: When the bankruptcy petition was filed four days remained before the scheduled state-court hearing. Upon the filing of the petition, MMLP was entitled to rely on the automatic stay and the notices required by the F.R.C.P. Gas Serv. Co. v. Hunt, 183 F.2d 417, 419-20 (10th Cir. 1950). Although the Court of Appeals correctly stated that reversal does not invalidate a pleading filed in state court prior to removal Bramwell v. Owen, 276 F.2d 36 (D. Ore. 1921), the federal rules of procedure apply after removal, and the court erred when it went further by indicating no additional notice was necessary after removal. It is the general rule that summary judgment may not be entered sua sponta or without effective notice, and there must be strict adherence to the notice and hearing requirements, and to do otherwise is a violation of due process or an abuse of discretion. Underwood v. Hunter, 604 F. 2d 367, 369 (5th Cir. 1979); Monroe Div. of Litton Business Systems, Inc. v. De Bari, 562 F. 2d 30, 33 (10th Cir. 1977); Choudry v.

Jenkins, 559 F. 2d 1085, 1088-89 (7th Cir.), cert. denied sub nom,, Indiana v. Choudry, 434 U. S. 977 (1977); Swallow v. U. S., 380 F. 2d 710 (10th Cir. 1967).

None of the cases cited by the Tenth Circuit hold that additional or new notice of the hearing is required after removal. Indeed, the general rule is not affected by removal to federal court, and adequate notice of the hearing is required after removal. Allied Tire Sales, Inc. v. Kelly-Springfield Tire Co., 396 F.2d 704 (3d Cir. 1964). This is especially true since the federal procedural rule requiring 10 days notice must apply after removal. F.R.C.P. Rule 56. Moreover, when GECC filed its complaint to lift the stay, the hearing was actually set for late October, and MMLP was certainly entitled to expect that none of the matters would be heard until that time.

The October 30 hearing did not cure the defect, because the burden of proof on summary judgment had shifted to MMLP and the bankruptcy court refused to vacate its summary judgment and allow the hearing to proceed de novo with respect to the issues relating to summary judgments as suc, MMLP was prejudiced Armstrong v. Manzo, 380 U. S. 545 (1965).

Although Section 362 (f) of Bankruptcy Act provides that a bankruptcy court may grant "such relief from the stay... as is necessary to prevent irreparable damage to the interest of an entity in property," granting summary judgment was by no means necessary to protect GECC. Indeed, the financial crisis regarding MMLP's supposed inability to pay the staff of the shopping center was totally precipitated by GECC's instructions to the state-court appointed receiver not to utilize any funds held by the receiver to pay MMLP's bills. (See affidavit attached to Appendix A3) The receiver's affidavit showed that he was holding over $40,000, but was unable to pay $12,000 in accounts payable. Moreover, at the October 30 hearing, the evidence showed MMLP had additional accounts receivable and could have funded the structural repairs from operating revenues and/or additional capital contributions by the partners, if the court had permitted. Instead, the court panicked and allowed GECC to say nix to the debtor using its revenues to pay operating expenses. Moreover, GECC's interest in the shopping center was in no way imperilled. It is a matter of simple arithmetic. If the operating funds had been used to pay expenses and the costs of repair and GECC had not been permitted to immediately foreclose, in would not have

cost GECC an additional penny, since whatever funds that would have been used by MMLP to pay expenses and repairs costs would have simply raised the indebtedness to GECC back to the same amount. The same funds would have been used regardless who, at the time owned the property, made the repairs. GECC's eagerness to acquire the property was suspect, particularly in view of GECC's refusal to agree to forestall foreclosure to permit MMLP to raise $200,000 additional capital from its partners in order to fund the structural repairs. MMLP understandably did not desire to raise such additional sum from its limited partners if GECC would immediately foreclose MMLP out.

CONCLUSION

A writ of certiori should issue to the Court of Appeals for the Tenth Circuit.

Respectfully submitted

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APPENDIX A1

THE UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MONTGOMERY MALL LIMITED PARTNERSHIP,

a Texas Limited Partnership,

Debtor

GENERAL ELECTRIC CREDIT CORPORATION,

a New York Corporation

Appellee

v.

MONTGOMERY MALL LIMITED PARTNERSHIP,

a Texas Limited Partnership,

Appellant

Date: April 7, 1983

704 F. 2d 1173 (10th Cir. 1983)

No. 81-1525

Before DOYLE, Circuit Judge, BREITENSTEIN, Senior Circuit Judge, and SEYMOUR, Circuit Judge

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DOYLE, Circuit Judge

The appellant, the Montgomery Mall Limited Partnership, appeals from a federal bankruptcy court order which granted foreclosure by way of summary judgment, in favor of appellee, General Electric Credit Corporation. That order was affirmed by the federal district court.

Montgomery Mall is a limited partnership and is the owner of the Montgomery Plaza Shopping Center located in Bernalillo County, New Mexico. The debt by Montgomery Mall to General Electric's predecessor in interest, General Electric Credit Corporation of Colorado, is secured by mortgages on the Center and by an assignment of leases and rents from the Center's operations.

Montgomery Mall (MMLP) failed to make payments due under its obligations. General Electric Credit Corporation (GECC) instituted a foreclosure action in the state court. That action was commenced on June 16, 1980 and sought (1) foreclosure of the mortgage on Montgomery Center; and (2) foreclosure of GECC's security agreement with MMLP covering rents and profits. The third element of relief which was prayed for was the appointment of a receiver for Montgomery Center.

MMLP filed an answer to the action on July 15, 1980. In it, MMLP admitted its liability to GECC in excess of $8,000,000, and admitted that it had failed to make a payment when due and after notice by GECC. It denied, however, that it was in default.

GECC moved for summary judgment pursuant to Rule 56 of the New Mexico Rules of Civil Procedure. This motion was set to be heard on September 8, 1980. On September 4, 1980, MMLP filed a Chapter 11 bankruptcy petition, which had the effect of staying the action, including the pending summary judgment hearing.

GECC proceeded to file, on September 24, 1980, several documents, including (1) a motion to dismiss MMLP's Chapter 11 proceeding; (2) an application for removal of GECC's pending state action; and (3) a complaint to modify the automatic stay of the state foreclosure proceedings pursuant to 11 U.S.C. § 362 (d). A copy of this complaint was mailed to MMLP on September 24, 1980.

On October 1, 1980, GECC informed Bankruptcy Court Judge Johnson that it wished to move for emergency relief

from the stay of foreclosure proceedings pursuant to §362 (f) of the Bankruptcy Code. The Judge indicated that he informed MMLP's counsel of this motion on October 1.

On October 2, 1980, GECC's motion for emergency relief and summary judgment was filed. The grounds for emergency relief were two-fold. First, the claim of GECC that MMLP had failed to provide funds for the payment of operating expenses, and for the salaries of maintenance, security, and management personnel. Second, GECC claimed that MMLP had failed to make funds available for structural repairs which, if not undertaken, would warrant shut-down of the Center.

The hearing on the motion was heard on the same day it was filed, October 2, and Judge Johnson found that MMLP did not intend to meet payroll and operating expenses which were then due, that immediate structural repairs were required to preserve the safety of the tenants and customers of the Center, and that irreparable harm to GECC would thereby ensue. Judge Johnson also terminated the stay to the extent necessary for GECC to foreclose its mortgages and security interests. Also, judgment against MMLP, in the sum of $8,054,165.33 plus accrued interest, was entered.

Judge Johnson's judgment, however, was without prejudice to the rights of the debtor within ten days from the date thereof to move to vacate the judgment upon an adequate hearing.

On October 14, 1980, MMLP filed a motion to vacate the order and judgment. Taht motion was heard on October 30. On that occasion, MMLP presented little evidence as to why the earlier grant of summary judgment should not be vacated. Instead, counsel for MMLP argued that the grant of summary judgment was procedurally defective. GECC opposed MMLP's approach at the October 30 hearing by presenting evidence in support of its motion for summary judgment.

On November 3, 1980, Judge Johnson reaffirmed his decision to grant summary judgment to GECC and against MMLP.

The propriety of these proceedings is what is being challenged here now.

The assertion of MMLP is that the bankruptcy court lacked jurisdiction under §362 (f) to grant summary relief in favor of GECC.

This is a position that might have had some validity prior to the Bankruptcy Reform Act of 1978, Pub.L.No. 95-598. See in re Roloff, 598 F.2d 783, 785 (3d Cir. 1979). Also, considering the Supreme Court's recent decision in Northern Pipeline Const. Co. v. Marathon Pipe Line Co., U.S. _____, 102 S.Ct. 2858 (1982), MMLP's assertion

might have some merit. Northern Pipeline held unconstitutional the assignment of broad jurisdiction to bankruptcy judges. 102 S.Ct. at 2874. See 28 U.S.C. § 1471 (Supp. IV 1980). However, the Supreme Court, in Northern Pipeline, was careful to say that the decision was not to be applied retroactively. See Northern Pipeline, supra, at 2880. The interpretation has been that the Northern Pipeline decision does not have affect on bankruptcy court decisions pending on appeal before June 28, 1982, the date of the Supreme Court opinion. Barnes v. Wheland, 689 F.2d 193, 196 n.1 (D.C. Cir. 1982).

In examining the authority or jurisdiction of the Judge to grant summary relief in favor of GECC prior to the Northern Pipeline decision, it would appear that such authority did exist. See 124 Cong. Rec. 534,010 (Oct. 5, 1978) (remarks of Senator DeConcini). The Bankruptcy Reform Act "grants the courts of appeals original and exclusive jurisdiction of all cases under Title 11. That jurisdiction in turn is completely delegated to the bankruptcy court with the sole exception of punishing for contempts by imprisonment and enjoining other courts. The bankruptcy court is thus given pervasive jurisdiction over all proceedings arising in or related to

bankruptcy cases. In addition, the bankruptcy court is given exclusive jurisdiction of the property of the estate in a case under Title 11. This represents a major improvement over present law hwere the distinction between summary and plenary jurisdiction often results in wasteful litigation."

The Rule 56 Problem

Rule 56 of the Federal Rules of Civil Procedure states that a motion for summary judgment "shall be served at least 10 days before the time fixed for the hearing." Fed. R. Civ. P. 56 (c). MMLP asserts that, since it received no more than a one day notice of the October 2 hearing conducted by Judge Johnson, the requirements of Rule 56 were not met.

Apparently a hearing conducted without proper notice will be set aside. See Swallow v. United States, 380 F. 2d 710, 712 (10th Cir. 1967) (one day notice of hearing to set aside default judgment is inadequate).

But there are differences between these proceedings and an ordinary case. The first of these is that MMLP was on notice that GECC sought summary judgment in the stayed state proceedings. Indeed, "GECC's State Court motion for summary judgment was begun on August 19th and set for hearing on September 8, a full 20 days." Surely, therefore,

MMLP should have been aware that GECC was likely to pursue summary judgment relief in bankruptcy court. At the very least, MMLP should have prepared affidavits in opposition to GECC's state court motion for summary judgment, affidavits which could have been used in opposition to GECC's bankruptcy court motion.

The foregoing indicates that MMLP cannot be heard to complain that it was prejudiced by short notice of the October 2 bankruptcy court hearing. Cf. Milwaukee Typographical Union No. 23 v. Newspapers, Inc., 639 F.2d 386, 391 (7th Cir.), cert. denied, 454 U.S. 838 (1981) ("where no potential disputed material fact exists, a summary judgment will not be disturbed even though the district court disregarded the procedure which should have been followed"); Hoopes v. Equifax, Inc., 611 F. 2d 134, 136 (6th Cir. 1979) ("it is not reversible error for a district court to grant summary judgment before expiration of the ten day period if the non-moving party can demonstrate no prejudice").

Moreover, Judge Johnson's order was subject to a motion to vacate on the part of MMLP. such a motion was, indeed, made, and a full hearing was had on the motion on October 30, some 29 days after GECC moved for summary judgment in

bankruptcy court, and some 72 days after GECC first moved for summary judgment in state court. nevertheless, MMLP presented very little evidence at the October 30 hearing in support of its motion to vacate, arguing primarily that the October 2 hearing violated the 10 day notice requirement of Rule 56(c).

Section 1479(c) of Title 28 suggests a third reason why, in proceedings such as these, it was not inappropriate for Judge Johnson to grant summary judgment. The section provides:

> All injunctions, orders or other proceedings, in an action prior to removal of such action under section 1478 of this title shall remain in full force and effect until dissolved or modified by the bankruptcy court.

28 U.S.C. 1479(c) (Supp. IV 1980).

Section 1479(c) is virtually identical to Section 1450 of Title 28. It has been held under Section 1450 that motions pending in state court survive removal to federal court, and may be passed upon by the federal court. Bramwell v. Owen, 276 F. 36, 39 (D. Oregon 1921); 1A Moore's Federal Practice,

¶0.168 (4.-5) & n. 12 (1974) (interpreting Section 1450); 1 Collier on Bankruptcy, ¶ 3.01 (b) & n. 120 (1980) (interpreting Section 1479 (c)).

Sections 1450 and 1479 give at least implicit recognition that notice had in state court proceedings is sufficient to serve as notice of the pendency of proceedings, orders, and motions removed to federal court. Cf. Bryce v. Southern Ry., 129 F. #966, 967 (Cir.Ct. D.S.C. 1904) (removal does "not extend time for answering the complaint"); in re Chamberlain, 125 F. 631, 632 (Cir. Ct. D. Conn. 1903) (notice of defense and notice of intent to suffer default filed in state court does not have to be filed again upon removal to federal court; these notices filed in state court serve as evidence of defendant's intended action in federal court).

Our conclusion is that MMLP ought not to be heard to complain of inadequate notice of GECC's intent to move for summary judgment. This conclusion is not altered by the fact that MMLP's Chapter 11 proceeding and GECC's removed state proceeding had different cause numbers. They clearly concerned one and the same item of business, the Montgomery Shopping Center.

There is one other matter to be mentioned and that is § 362 (f) of Title 11, which provides:

> The (bankruptcy) court, without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing * * * .

11 U.S.C. § 362 (f) (1976).

In making its bankruptcy court motion for summary judgment, GECC asserted that irreparable injury would ensue unless expenses of the Montgomery Shopping Center were met and unless structural repairs were undertaken. Indeed, the City of Albuquerque's mechanical and structural engineer testified that the shopping center presented a public hazard, and that he would recommend that it be closed.

Accordingly, it was not inappropriate for Judge Johnson to grant relief in accordance with § 362 (f) with provision for a rehearing upon a motion to vacate.

In light of the foregoing, the grant of summary judgment by Judge Johnson is affirmed. Also, we deem it unnecessary to

consider GECC's motion to dismiss this appeal for mootness under Rule 805 of the Rules of Bankruptcy Procedure. This court has, in any event, twice denied the same motion.

APPENDIX A2

In re

MONTGOMERY MALL LIMITED PARTNERSHIP,

a Texas limited partnership,

Debtor,

GENERAL ELECTRIC CREDIT CORPORATION,

a New York Corporation,

Plaintiff,

v.

MONTGOMERY MALL LIMITED PARTNERSHIP,

a Texas limited partnership,

Defendant

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF NEW MEXICO

ORDER AND JUDGMENT

October 2, 1980

Chapter 11, No. 80-00938J

Adversary Proceeding, No. 80-0419J

This cause came on before the Court on the plaintiff General Electric Credit Corporation's ("GECC") Motion for Order Granting Immediate Relief from Stay and Granting

Summary Judgment. GECC was represented by Irving Sulmeyer and Jonathan B. Sutin. The debtor, Montgomery Mall Limited Partnership ("MMLP"), was represented by Jennie Deden Behles. The Court has considered the documents on file in this action, including the state court foreclosure action, the testimony presented to the Court in support of the motion, and the argument of counsel. The Court is fully informed and advised regarding all of the issues raised by the motion.

THE COURT FINDS:

1. The debtor has not met and does not intend to meet the payroll and operating expenses presently due and owing at the Montgomery Plaza Shopping Center and it appears that approximately $4,000 in payroll expenses that are due to administrative, maintenance, and security employees on October 2, 1980 will not be met. Nonpayment of this payroll will likely cause these employees to stop work. A work stoppage will likely cause disruption of the running of the shopping center and may likely precipitate its closing.

2. Immediate significant structural repairs are required in order to preserve the safety of the tenants and customers of the Montgomery Plaza Shopping Center. MMLP has not made any funds available for the structural repairs nor

has the debtor undertaken to make such repairs. MMLP has not indicated any intent to embark on or provide money for these repairs.

3. MMLP's current indebtedness to General Electric Credit Corporation is $7,762,564.21 plus accrued interest through August 31, 1980 of $278,805.43, plus accrued interest for September, 1980 of $71,156.77, plus accrued late charges of $12,795.69, plus attorney fees and costs and expenses of litigation and colleciton. The value of the assets of MMLP, is currently not more than $7,000,000.

4. GECC has not been offered, nor has GECC received adequate protection for its interest in Mongomery Plaza Shopping Center.

5. MMLP has not sought or offered adequate protection to GECC for the use of cash collateral pursuant to section 363 (c) and MMLP has no authority to use said cash collateral. It appears that if the cash collateral held by the receiver, Leon Management Coporation is turned over to MMLP, MMLP may use GECC's cash collateral to pay current operating expenses in violation of GECC's direcitons and in violation of 11 U.S.C. § 363 (c).

6. The indebtedness to GECC is secured by a valid mortgage upon the real property of MMLP and a valid security interest in the personal property of MMLP and a valid assignment of all leases and rents of its shopping center known as Montgomery Plaza Shopping Center.

7. MMLP has no equity in its real or personal property or the rents derived therefrom. MMLP is not in a position to propose an effective or meaningful reorganization.

THE COURT CONCLUDES:

1. The court has jurisdiction of the subject matter and issues raised by the motion.

2. Without the immediate payment of current operating expenses, including current payroll due October 2, 1980, GECC and Montgomery Plaza Shopping Center will suffer permanent irreparable damage due to loss of customers, tenants, and harm to business reputation.

3. Without the immediate structural reparis necessary to preserve the structural stability and safety of the shopping center and its tenants and customers, permanent and irreparable damage will result to GECC and Montgomery Plaza Shopping Center due to the loss of tenants and customers and

harm to business reputation, and possible liablities for injuries suffered by tenants or customers and injuries to property may occur as a result of structural defects.

4. MMLP has no equity in its real and personal property or the rents derived therefrom. MMLP has no ability to propose or consummate a meaningful or effective reorganization.

5. MMLP has not offered nor given GECC any adequate protection for its interest in Montgomery Plaza Shopping Center.

6. Immediate relief from the automatic stay by a vacation and termination of the automatic stay and a judgment of foreclosure are necessary to prevent irreparable damage to GECC.

7. MMLP should be required to turn over to GECC all rents and income from the shopping center that it has in its possession, custody or control.

THE COURT ORDERS that GECC's Motion for Order Granting Immediate Relief from Stay and Granting Summary Judgment is granted.

THE COURT ORDERS, AJUDGES AND DECREES:

1. The automatic stay is modified, vacated and terminated to the extent appropriate and necessary to permit GECC to foreclose its mortgages and security interests on the real and personal property of MMLP and the estate ("the property").

2. MMLP is required to turn over to GECC all rent and income from the property in MMLP's possession, custody or control.

3. Richard J. Leon, receiver, is restored to possession of the property on behalf of GECC subject to the liens and security interests of GECC.

4. The rents from the property may be used by the receiver for the maintenance, repair, upkeep and safety and security of the property. The funds used are deemed mandatory advances by GECC under the promissory notes, mortgages, security agreements and loan agreements.

5. GECC is hereby awarded judgment against MMLP in the sum of $8,054,165.33 plus accrued interest, representing the indebtedness of MMLP to GECC on the promissory notes and obligations alleged in GECC's foreclosure complaint.

6. GECC is hereby further awarded judgment against MMLP for all costs and expenses of collection, foreclosure and litigation, including costs and attorney fees, incurred by GECC, and is further awarded an additional amount for expenses of foreclosure sale, including costs and a reasonable attorney fee, incurred by GECC in an amount which the Court may by further order direct.

7. The liens of GECC's mortgages and security agreements alleged in GECC's foreclosure complaint are hereby foreclosed against MMLP in the total sum of $8,054,165.33 plus accrued interest and costs and expenses of collection, foreclosure and litigation, and the liens of the mortgages and security interests are hereby declared first and paramount liens against the property described in the mortgages and security agreements (and, more particularly with respect to the real property, against the real property described on Exhibit A attached hereto).

8. MMLP is barred and foreclosed from any and all right, title, interest and equity of redemption in and to the property after the expiration of one month following the sale of the property as hereinafter ordered by the Court.

9. GECC may proceed to have all of the property covered by GECC's mortgages and security agreements and interests sold at public auction in the manner prescribed by law. Richard J. Leon is hereby appointed Special Master by this Court and he shall conduct the sale. The sale shall be for cash payable immediately. GECC may be a purchaser at the sale and may use this judgment or a portion of this judgment as a credit on its bid.

10. The Special Master shall submit a report of sale and Special Master's Deed to the Court for approval, and upon such approval, shall be released and discharged. The Special Master shall receive compensation for his services at the rate of $75.00 per hour.

11. The proceeds of the foreclosure sale shall be applied in the following order:

a. to the expenses of conducting the sale, including the Special Master's compensation, costs of publication, and to GECC's attorney fees in this regard;

b. to the costs of this action;

c. to the payment of this judgment together with interest thereon at the rate of 11% per year from the date of entry of this judgment until the date of payment; and

d. to any junior lienholder named as a defendant herein according to the priority of any such claimant or claimants and in the amount of any judgment obtained by such junior lienholder.

12. The purchaser at foreclosure sale will take title to the property free and clear of any and all claims of all parties in this action, subject, however, to the following:

a. to a one-month statutory right of redemption; and

b. to any patent reservations, easements, restrictions of record, and assessments.

13. This Judgment is without prejudice to the rights of the debtor within 10 days from the date hereof to move to vacate the judgment you on adequate showing.

/s/ Robert Johnson

UNITED STATES BANKRUPTCY JUDGE

[Exhibit A (legal discription omitted]

APPENDIX A3

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF NEW MEXICO

In re

MONTGOMERY MALL LIMITED PARTNERSHIP,

a Texas limited partnership,

Debtor

GENERAL ELECTRIC CREDIT CORPORATION,

a New York corporation,

Plaintiff

v.

MONTGOMERY MALL LIMITED PARTNERSHIP,

a Texas limited partnership,

Defendant.

MOTION FOR ORDER GRANTING IMMEDIATE RELIEF FROM STAY AND GRANTING SUMMARY JUDGMENT AND AFFIDAVIT IN SUPPORT

(§ 362 (f))

Plaintiff, General Electric Credit Corporation ("GECC") moves the Court for an order pursuant to 11 U.S.C. § 362 (f) vacating the Automatic Stay and granting GECC's Motion for Summary Judgment in the pending foreclosure action removed to this Court, and requiring the receiver and the Debtor to turn over to GECC all funds and cash collateral in their possession, on the following grounds:

1. Debtor filed a petition herein under Chaper 11 of the Bankruptcy Code on September 4, 1980.

2. Debtor's sole asset is a shopping center is Bernalillo County, New Mexico known as Montgomery Plaza Shopping Center, consisting of certain real estate, improvements and attendant personal property.

3. On September 24, 1980, GECC filed herein a Complaint to Modify Stay and a Motion to Dismiss and to Prohibit Debtor's Use of Cash Collateral. This Court has set a hearing on October 23, 1980, at 1:30 p.m., to consider the matters raised by the Complaint and the Motion.

4. On September 24, 1980, GECC filed herein an Application for Removal, removing to this Court a foreclosure action which GECC had commenced in the District Court for the County of Bernalillo, State of New Mexico, Cause No. CV-

80-05231. Pending in the removed foreclosure action is a Motion for Summary Judgment filed August 19, 1980. This Motion was set to be heard before the Bernalillo County District Court on September 8, 1980.

5. On the afternoon of September 30, 1980, GECC was informed by the receiver in the foreclosure action, Richard J. Leon of Leon Management Corporation, that the receiver would be unable to meet approximately $4,000 in payroll expenses on October 2, 1980, for the following persons employed by the receiver: one bookkeeper, six security guards, one operations supervisor, three maintenance workers and one building manager. Non-payment of payroll would cause these employees at the shopping center to stop work. The existing leases with tenants at the shopping center require the landlord to provide security, maintenance and management services. A work stoppage would cause disruption of the running of the center, and would precipitate its closing. Mr. Leon also informed GECC that he would be unable to meet certain other current operating expenses, totalling approximately $8,000. Debtor has failed and refused to provide Mr. Leon with operating funds with which Mr. Leon can pay current payroll and other operating expenses.

6. Mr. Leon advised GECC that he spoke with David Goldner, purported general partner and president of a second purported general partner of Debtor, on September 30, and that Mr. Goldner said that he was coming to the shopping center on October 2, 1980, but that he was not bringing any money with him. Mr. Goldner stated that he would pay operating expenses and payroll only from the funds which the receiver would turn over to the Debtor.

7. Without the Debtor providing funds for the immediate payment of current operating expenses, including payroll for maintenance, security and management personnel, utilities for the common areas, and other essential services, Montgomery Plaza will suffer permanent irreparable damage due to loss of customers, tenants and harm to business reputation.

8. Immediate structural repairs are required in order to preserve the safety of tenants and customers of Montgomery Plaza. An inspection report dated September 16, 1980, of Design Professionals, Inc., a copy of which is attached hereto as Exhibit A, indicates that substantial structural repairs are required at the shopping center and recommends that the repairs be done "at the earliest possible time." The

report also states that "public safety is a serious concern." Without the Debtor providing funds for the immediate repairs, permanent and irreparable damage may result to Montgomery Plaza in loss of tenants and customers, harm to business reputation, and possible liabilities for any injuries suffered by tenants or customers. Debtor has failed and refused to make any funds available to the receiver for such repairs, and Debtor has not undertaken to complete such repairs, all to the irreparable harm of GECC and its collateral. Immediate temporary repairs will likely cost in excess of $50,000 to $100,000. Permanent repairs will cost $100,000 to $250,000.

9. Debtor has no equity in Montgomery Plaza. Current estimates of value are not more than $7,000,000. The obligation of Debtor to GECC is in excess of $8,000,000.

10. Since the filing of the Complaint herein, GECC has not been offered, nor has GECC received adequate protection for its security interest in Montgomery Plaza.

11. Debtor has failed and refused to advance or contribute any funds to the project. Debtor continues to have no reasonable prospect for reorganization under Chapter 11 of the Bankruptcy Code.

12. Debtor's plans to use GECC's cash collateral to pay current operating expenses are in violation of GECC's directions and in violation of 11 U.S.C. Section 363 (c).

13. Immediate relief from the automatic stay is necessary to prevent irreparable damage to GECC through damage to Montgomery Plaza and loss of cash collateral. Such damage will occur before the hearing presently scheduled for October 23, 1980.

* * * *

AFFIDAVIT OF RICHARD J. LEON

STATE OF NEW MEXICO)

COUNTY OF BERNALILLO)

I, Richard J. Leon, being first duly sworn, say:

1. I am President of Leon Management Corporation, receiver in the foreclosure proceeding initiated in the District Court for the County of Bernalillo, State of New Mexico, No. CV-80-05231.

2. I have personal knowledge of the facts stated herein.

3. Attached hereto as Exhibit 1 is a copy of my education and work background record.

4. On September 24, 1980, the receiver received written notice from General Electric Credit Corporation ("GECC") to hold in a separate account all income from Montgomery Plaza Shopping Center, and to make no disbursements from that account.

5. All funds in the receiver's operating account had been generated from rents of Montgomery Plaza ("rents"). The receiver has made no disbursements from the operating account after receipt of the notice from GECC on September 24, 1980. The receiver presently has $40,853.43 in its operating account.

6. Debts in the sum of approximately $12,000, including payroll, are presently due and payable by the Debtor.

7. On October 2, 1980, the payroll for the period September 18 to October 2, 1980 becomes due for the employees of the receiver who perform the administrative, security, maintenance and contracting services at Montgomery Plaza. This amounts to approximately $4,000. Those employees are: one bookkeeper, six security guards, one operations supervisor, three maintenance workers and one building manager.

8. The receiver has received no funds from the Debtor, although the Debtor has been aware of the payroll deadline. The employees will not continue to work after October 2, if payroll is not paid.

9. The landlord of the shopping center is obligated under the terms of the leases, to provide security, maintenance and management services, and to pay the utilities and operating expenses for the common areas.

10. If the shopping center loses on-site employees, the shopping center will lose tenants and customers, because the center can not operate without security, maintenance and management services, and because many tenants will likely terminate their leases if those services are not provided. The center also can not operate without immediate payment of common area utilities.

11. On September 30, 1980, I received a telephone call from David Goldner, a general partner of Debtor and president of a second general partner of Debtor. Mr. Goldner informed me that he would be at the shopping center on October 2, that he would pay payroll and other operating expenses from the rents which would be turned over to the Debtor, in spite of GECC's direction to the contrary, and that he was bringing no money with him.

12. On September 26, 1980, I received a copy of the report of investigation conducted by Design Professionals, Inc., dated September 16, 1980, a copy of which is attached to this affidavit as Exhibit 2. In my opinion, if the structural problems outlined in the report are not repaired forthwith, an immediate danger to public safety and welfare will exist. Further, in my opinion, if the structural problems outlined in the report become known to tenants and the public, and immediate loss of tenants and customers is likely to occur. If the repairs outlined in the report are not promptly and responsibly undertaken, the resulting damage to Montgomery Plaza will be irreparable and permanent. Temporary immediate repairs will cost $50,000 to $100,000. Permanent repairs, without upgrading the center to current seismic building code requirements, will cost $100,000 to $240,000.

13. In my opinion, the present value of Montgomery Plaza is less than $7,000,000.

APPENDIX A4

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF NEW MEXICO

In re

MONTGOMERY MALL LIMITED PARTNERSHIP,

Debtor

APPLICATION FOR REMOVAL

(filed September 24, 1980)

No. 80-00938J

Applicant, General Electric Credit Corporation ("GECC") respectfully shows the Court as follows:

1. Debtor Montgomery Mall Limited Partnership ("Debtor") filed in this Court a Voluntary Petition under Chapter Eleven, Title 11, United States Code. The number of bankruptcy case is 80-00938J.

2. The case sought to be removed to this Court is now pending in the District Court, Bernalillo County, State of New Mexico, Docket No. CV-80-05231.

3. The subject matter of the state court action to be removed is foreclosure of real property (namely, Montgomery Plaza Shopping Center) and attendant personal property which

is owned by the debtor and the debtor's only asset. The action sought to be removed is related to the bankruptcy proceeding of the debtor.

4. Under Section 1471(c) of Title 28, United States Code, this Court has jurisdiction of the case sought herein to be removed to this Court; and such case is removable under the provisions of Section 1478 of Title 28, United States Code.

5. GECC files herewith a bond with good and sufficient security conditioned that GECC will pay all costs and disbursements incurred by reason of the removal proceedings hereby brought should it be determined that this action is not removable or is improperly removed.

WHEREFORE, debtor prays that the action bearing docket No. CV-80-05231 and now pending in the District Court of Bernalillo County, New Mexico, be removed therefrom to this Court.

* * * *

STATE OF NEW MEXICO)

COUNTY OF BERNALILLO)

Larry G. Smith, being first duly sworn upon oath, states that he is the Region Manager of the Applicant, General Electric Credit Corporation; that he has read the foregoing

Application For Removal and knows the contents thereof and the same is true of his own knowledge and belief; and that he has authority to verify the Application For Removal.

APPENDIX B1

28 U.S.C. § 1914. District court; filing and miscellaneous fees; rules of court

(a) The clerk of each district court shall require the parties instituting any civil action, suit or proceeding in such court, whether by original process, removal or otherwise, to pay a filing fee of $60 except that on application for a writ of habeas corpus the filing fee shall be $5.

(b) The clerk shall collect from the parties such additional fees only as are prescribed by the Judicial Conference of the United States.

(c) Each district court by rule or standing order may require advance payment of fees.

(d) This section shall not apply to the District of Columbia.

(June 25, 1948, ch 646, § 1, 62 Stat. 954; Nov. 6, 1978, P. L. 95-598, Title II, §244, 92 Stat. 2671.)

APPENDIX B2

RULE 56. SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days

from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

* * * *

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is not genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.